Federal Court  Cour fédérale

Date: 20200124

Docket: IMM-3270-19

Citation: 2020 FC 120

Ottawa, Ontario, January 24, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

EMMANUEL KWADWO KYERE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant, Emmanuel Kwadwo Kyere, is a 39-year old citizen of Ghana. He arrived in Canada as a permanent resident in March 2008.

[2] Mr. Kyere was convicted of sexual assault in June 2017 and sentenced to 20 months of imprisonment (less a brief period of pre-sentence custody). While Mr. Kyere served his sentence, an Officer with the Canada Border Services Agency [CBSA] visited him. The Officer later

prepared a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*].

[3] This report recommended that Mr. Kyere be referred to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board [ID] to determine if he is inadmissible for serious criminality under paragraph 36(1)(a) of the *IRPA.* A delegate of the Minister of Public Safety and Emergency Preparedness [the Delegate] concurred with the Officer's report on February 14, 2019 and referred the matter to the ID with no right of appeal.

[4] Mr. Kyere has now applied under subsection 72(1) of the *IRPA* for judicial review of the Delegate's decision. He asks the Court for an order quashing the decision to refer him to an admissibility hearing; directing an officer to grant his request against a referral to an admissibility hearing; or, in the alternative, an order referring the matter to the CBSA for re-determination by a different officer in accordance with the law. The issue, therefore, is whether this relief should be granted.

[5] For the following reasons, Mr. Kyere's application for judicial review will be dismissed.

I. Background

[6] When the Officer interviewed Mr. Kyere, she delivered an Inadmissibility Report Background and Personal Information Form [the BPIF], which, among other things, included an Inadmissibility Report Supplementary Questionnaire [the BPIF Questionnaire].

[7] At the interview, the Officer also gave Mr. Kyere a letter informing him of the BPIF's purpose and possible outcomes; she invited him to make submissions. Mr. Kyere informed her of his conviction and parole eligibility dates. They discussed other matters such as Mr. Kyere's family and home.

[8] Mr. Kyere completed the BPIF and returned it to the Officer in early November 2017. As to the circumstances surrounding the conviction, Mr. Kyere wrote in the BPIF Questionnaire that:

> I and the victim had being together from 2011 till 2013 when the incidence happen, we lived together in Etobicoke 2011 and moved to Burlington same year, Everything changed in 2013 when we started going through some hard times when she felt insecured about some of the ladies in the church I was pastoring in Toronto, we had a lots of arguements over that for a while until we decided to seperate and work the relationship from a distance. In 2013 I visited her and met another male in her house and had arguement on that which resulted in the incident I was charged and convicted of. I was at her house in Burlington July 2013, when a neighbour called 911 because of the long Arguements we had during the night [spelling and grammatical errors in original].

[9] When asked how he felt about the conviction, Mr. Kyere wrote that:

> I really feel very shameful and very embarrassed because I play a very major role in my community as a pastor and I have opened up to my four children who look up to me as a Dad and a role model. Many people still can't belive what happened because I and the victim never shared our struggles with the Community because people were looking up to us, expecially me being a paster of a church with different nationalities [spelling and grammatical errors in original].

[10] When asked what he needed to change in order to avoid any future involvement with the law, Mr. Kyere wrote, “I simply have to make right and good choices in every circumstances and learn to let go”.

[11] Finally, when asked if he was enrolled in any rehabilitation programs, he stated that he had “already completed a four section life skills about sexual effenders programme commended by my trial lawyer and the Judge also ordered me to enrolled in sex offenders programme upon my release [spelling and grammatical errors in original]”. Earlier in the BPIF, Mr. Kyere added that he had learned “a lot about self control, anger management and how to engage in a healthy relationship” because of this counselling.

[12] Mr. Kyere made little reference to the sexual assault or to the victim in the BPIF Questionnaire. He did not mention any feelings of remorse or the impact on the victim. He did not confirm any further plans to rehabilitate besides the counselling already completed.

[13] On January 29, 2019, the Officer completed her report to support a recommendation for an admissibility hearing and sent it to the Delegate. Mr. Kyere was not granted an interview or an opportunity to respond to the concerns raised in the report. On February 14, 2019, the Delegate referred the report to the ID for an admissibility hearing.

II. Improper Affidavit

[14] The respondent raises a preliminary issue that Exhibit B in Mr. Kyere's affidavit is improper. This Exhibit has various certificates and letters concerning Mr. Kyere's rehabilitation efforts as well as documentation about his parole.

[15] This documentation was not before the Officer or the Delegate and was thus improperly included in Mr. Kyere's affidavit. It should be struck from the record before the Court following *Dayebga v Canada (Citizenship and Immigration)*, 2013 FC 842, where the Court struck an improper affidavit and its exhibit:

> [25] The applicant filed an affidavit which was not before the Board that made the decision in this matter. I am not prepared to consider this evidence. The jurisprudence of this Court is to the effect that the review of a tribunal's decision should proceed on the basis of the evidence before the decision maker (see *Fabiano v Canada (Minister of Citizenship and Immigration)* 2005 FC 1260 at paragraphs 22 to 25, [2005] FCJ No 1510). Accordingly, the affidavit with its exhibit sworn to on December 17, 2012 is struck.

[16] Exhibit B in Mr. Kyere's affidavit dated June 21, 2019, is struck.

III. Analysis

[17] Two substantive issues require the Court's attention: (i) was there a breach of procedural fairness; and (ii) was the decision to refer Mr. Kyere to an admissibility hearing reasonable?

A. *What is the Standard of Review?*

[18] A decision to refer a permanent resident to an admissibility hearing under section 44 of the *IRPA* is reviewed against the standard of reasonableness *(Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at para 11; *Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 at para 17; *Richter v Canada (Citizenship and Immigration)*, 2008 FC 806 at para 9, aff'd 2009 FCA 73).

[19] The Supreme Court of Canada has recently revised the framework for determining the applicable standard of review for administrative decisions on the merits. The starting point is the presumption that a standard of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 [*Vavilov*]).

[20] This presumption can be rebutted in two circumstances; the first is when the legislature has indicated the applicable standard of review; the second is when the rule of law requires the standard of correctness to be applied (*Vavilov* at paras 17 and 23; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27). Neither circumstance is present in this case to warrant departing from the presumption of reasonableness review.

[21] The reasonableness standard of review is concerned with both the decision-making process and its outcomes. It tasks the Court with reviewing an administrative decision for the existence of internally coherent reasoning and the presence of justification, transparency and intelligibility; and determining whether the decision is justified in relation to the relevant factual

and legal constraints that bear on the decision (*Vavilov* at paras 12, 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[22] If the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome; nor is it the function of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[23] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa* at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[24] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal observed in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied".

B. *Was there a Breach of Procedural Fairness?*

[25] In Mr. Kyere's view, the Officer's reliance on extraneous materials—notably, the police report, the warrant for incarceration, excerpts from the trial transcript and his background/personal information form—without giving him an opportunity to respond, violated his right to a fair hearing and was an affront on procedural fairness in general. He says the Officer, or the Delegate, should have interviewed him and disclosed the extraneous evidence that the Officer relied upon in her report and afforded him an opportunity to respond.

[26] Mr. Kyere's submissions are misguided.

[27] Referrals to the ID under subsections 44(1) and (2) of the *IRPA* attract minimal participatory rights of procedural fairness. Justice De Montigny clearly explained this in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*]:

> [29] … I am of the view that the duty of fairness is clearly not at the high end of the spectrum in the context of decisions made pursuant to subsections 44(1) and (2). Even assuming that a permanent resident is entitled to a somewhat higher degree of participatory rights than a foreign national as a result of a greater establishment in Canada leading to more serious consequences in the event of removal, I am satisfied that the process followed in this case satisfies the requirements of procedural fairness. Prior to the decision to make a report, the appellant was interviewed, given a letter setting out the nature of the decision to be made, and advised that he would have no right to appeal the removal order if one was issued by the ID. He was also invited to make written submissions and to provide letters of support, and he availed himself of these options. The submissions and supporting documents he presented were considered by the Officer. Bearing in mind that the decisions to write a report and to refer it to the ID do not involve a final determination of the appellant's rights to stay in Canada, as was the case in *Baker*, I have no doubt that the

> appellant was afforded the kind of participatory rights that decisions of this nature warrant.
>
> …
>
> [34] … All of the relevant cases from the Federal Court stress that a relatively low degree of participatory rights is warranted in the context of subsections 44(1) and (2), and that procedural fairness does not require the officer's report to be put to the person concerned for a further opportunity to respond prior to the section 44(2) referral to the ID. To the extent that the person is informed of the facts that have triggered the process is given the opportunity to present evidence and to make submissions, is interviewed after having been told of the purpose of that interview and of the possible consequences, is offered the possibility to seek assistance from counsel, and is given a copy of the report before the admissibility hearing, the duty of fairness will have been met. …

[28] In this case, the Officer interviewed Mr. Kyere, provided him with a letter advising of the nature of the decision being made, gave him the BPIF, and advised him of the consequences of his submissions in the BPIF Questionnaire. This is substantively the same procedure endorsed in *Sharma*. The Officer clearly considered Mr. Kyere's submissions. Nothing in the Officer's report was unknown to Mr. Kyere. There was no breach of procedural fairness.

[29] Neither the Officer's report nor the Delegate's decision to refer the matter to the ID is a final determination of Mr. Kyere's right to remain in Canada as a permanent resident. The Court's jurisprudence confirms there is usually no duty to interview an individual subject to a report under subsection 44(1) of the *IRPA*, so long as the affected individual has an opportunity to make submissions and to know the case against him or her. Also, there is no obligation to disclose the report to allow the individual a further opportunity to respond prior to a referral under subsection 44(2) (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005

FC 429 at para 72 [*Hernandez*]; *Hernandez v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 725 at para 22; *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 158 at para 31).

C. *Was the Referral Decision Reasonable?*

[30] Mr. Kyere denies the Officer interviewed him. In his view, the Officer erroneously characterized their brief meeting of five to ten minutes as an interview, leading to an unreasonable conclusion in the decision to refer him to the ID for an admissibility hearing. Mr. Kyere suggests that an "interview" cannot occur in this short timeframe. This argument lacks merit.

[31] Mr. Kyere does not deny meeting with the Officer; nor does he deny her description in the report that he "was cooperative during the interview" and reiterated to the Officer his desire to remain in Canada. What does it matter whether what occurred was an "interview" or a "brief meeting"? This has no effect whatsoever on the reasonableness of the Officer's report or the Delegate's decision to refer the report to the ID.

[32] According to Mr. Kyere, the Officer fundamentally misjudged the evidence related to his rehabilitation. In Mr. Kyere's view, the Officer misstated the timing of the counselling. He says the Officer unreasonably found that his counselling was not successful.

[33] In determining the possibility of Mr. Kyere's rehabilitation, the Officer was entitled to reference Mr. Kyere's counselling and his statement to a classification officer at Maplehurst

Correctional Complex that he did not need to be sent to a treatment centre for intensive programming. The Officer expressly qualified her statement that "the rehabilitation he took prior to his incarceration was not successful, as he told a classification officer at Maplehurst, just a month after the counselling, that he was innocent [emphasis added]". Contrary to Mr. Kyere's claim, this statement accords with the factual timing of events and was an entirely reasonable conclusion to draw. It was equally reasonable for the Officer to consider his later counselling in the context of the answers in his BPIF Questionnaire and conclude that he showed a lack of remorse toward the victim.

[34] Mr. Kyere says the Officer erroneously relied on the police report and on the charges that were dismissed. In his view, the Officer's reliance on charges or counts that were dismissed by the court amounts to an egregious error, one which calls for quashing of the resultant referral.

[35] I agree with the respondent that the Officer was entitled to rely on and refer to the police report. The Officer's report, despite Mr. Kyere's efforts to assert otherwise, correctly referenced the charges as just that: charges, not convictions. That the charges were dismissed does not make the reference to them in the Officer's report an "egregious error". Elsewhere in the report, the Officer correctly and explicitly said the charges were dismissed.

[36] The decision under review here is not the Officer's report but, rather, the Delegate's decision to refer the report to the ID. The Delegate was made aware in the Officer's report that the charges were dismissed. In my view, the Delegate made a reasonable decision to refer the

matter to the ID based on an accurate narrative of Mr. Kyere's conviction record in the Officer's report.

[37] Finally, Mr. Kyere says the Officer erred by making a negative credibility finding when she impugned his assertions that he was "very shameful and embarrassed" by his actions and had "learned a lot about self-control, anger management and how to engage in a healthy relationship". This argument is without merit.

[38] The Officer did not "impugn" Mr. Kyere's statement about being shameful and embarrassed. She merely acknowledged it. The Officer also acknowledged Mr. Kyere's statement that he had "learned a lot about self-control, anger management and how to engage in a healthy relationship". She did not deny that Mr. Kyere had learned these things.

[39] No contradiction exists between learning self-control, anger management, and relationship tools, and showing no remorse. One can learn these things while remaining unremorseful. Furthermore, shame and embarrassment do not equate to remorse. It is entirely possibly that Mr. Kyere attended and completed counselling, learned lessons, felt shame and embarrassment, and—at the same time—lacked remorse and showed a low possibility of rehabilitation.

D. *Should a Question be Certified?*

[40] At the conclusion of the hearing of this matter, the Court asked whether either party proposed a question for certification under paragraph 74(d) of the *IRPA*. Mr. Kyere's counsel

indicated that he wished to do so. I reminded counsel of the practice directive concerning certified questions contained in the *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* (November 5, 2018). This directive states, in relevant part:

> Parties are expected to make submissions regarding paragraph 74(a) [*sic*] in their written submissions and/or orally at the hearing on the merits. Where a party intends to propose a certified question, opposing counsel shall be notified at least five [5] days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question.

[41] After some discussion, I afforded counsel for Mr. Kyere two days to provide brief written submissions on the proposed question; counsel for the respondent was afforded two days following receipt of the proposed question to provide brief written submissions in reply.

[42] Mr. Kyere proposes two questions for certification:

> Question 1. In light of the decision of the Supreme Court in *Baker v Canada (MCI),* [1999] 2 SCR 817, does an Immigration Officer conducting an inadmissibility assessment with respect to a permanent resident under subsection 44(1) of the *IRPA* and/or a Minister's Delegate making a referral to the Immigration Division under subsection 44(2) of the *IRPA* owe more than a minimal duty of fairness to the permanent resident?
>
> Question 2. Does an Immigration Officer conducting an inadmissibility assessment with respect to a permanent resident under subsection 44(1) of the *IRPA* and/or a Minister's Delegate making a referral to the Immigration Division under subsection 44(2) of the *IRPA* have a duty to hold a hearing when an issue of credibility arises?

[43] In Mr. Kyere's view, these questions are serious questions of general importance and raise issues transcending his interest in this matter. According to Mr. Kyere, each of the questions would be determinative of the matter and neither the Court of Appeal nor the Supreme Court has previously determined either question.

[44] The respondent says the Court should not certify the proposed questions. According to the respondent, the Federal Court of Appeal in *Sharma* already considered and determined the question of what level of procedural fairness a permanent resident is owed in the context of subsections 44(1) and (2) of the *IRPA*.

[45] According to the respondent, a Ministerial delegate is not required to interview an individual subject to a section 44(1) report so long as that person knows the case against him and is provided an opportunity to make submissions. In the respondent's view, neither of the proposed questions for certification meets the test for certification because they do not transcend the interests of the parties and do not involve issues of broad significance or general application.

[46] Lastly, the respondent says the proposed questions are not dispositive of this application.

[47] The Federal Court of Appeal reiterated the test for certification of a question under paragraph 74(d) of the *IRPA* in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of

> the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[48] The questions proposed by Mr. Kyere should not be certified because they are not dispositive, do not transcend the interests of the parties, and do not raises an issue of broad significance or general importance. Case law has already established the level of procedural fairness owed to a permanent resident in the context of subsections 44(1) and (2) of the *IRPA* as considered and determined by the Federal Court of Appeal in *Sharma* (at para 29).

[49] The low level of procedural fairness owed may be met by providing the affected permanent resident with an opportunity to make submissions (either orally or in writing) and by providing a copy of the subsection 44(1) report so that meaningful submissions can be made (*Apolinario v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1287 at para 30).

[50] It is also unnecessary that an individual subject to a section 44(1) report be interviewed, so long as that person knows the case against him or her and was afforded an opportunity to make submissions (*Hernandez* at para 72).

IV. Conclusion

[51] The referral decision in this case is internally coherent, transparent, and intelligible. It is justified in relation to the relevant factual and legal constraints Mr. Kyere's application for judicial review is therefore dismissed.

[52] No question of general importance is certified.

JUDGMENT in IMM-3270-19

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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